Supreme Court, U.S.
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No. 92-1508

In The

Supreme Court of the United States

October Term, 1992

LEE WOODARD, et al.,

Petitioners,

v.

RALPH SEGHETTI, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Is the Tenth Circuit Court of Appeal's analysis of qualified immunity in conflict with decisions of the Supreme Court?

Does the lower court's decision that sexual harassment was not clearly established as violating the Equal Protection Clause on the facts of this case conflict with the decisions of other United States Appellate Courts?

Does the Tenth Circuit Court of Appeal's factual determination regarding constructive discharge require the Supreme Court's supervisory powers?

Does the Tenth Circuit Court of Appeal's analysis of Petitioners' First Amendment claims conflict with the decisions of other Circuits on the facts in this case?

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

NO GROUNDS EXIST FOR GRANTING CERTIORARI 3

1. The Tenth Circuit Court of Appeals properly applied the United States Supreme Court's analysis in determining that qualified immunity protected Respondents 3

2. The Tenth Circuit Court of Appeals' determination that sexual harassment as a violation of the Equal Protection Clause was not clearly established as applied to these facts did not conflict with the decisions of other Appellate Courts ... 5

3. The factual determination regarding constructive discharge does not require the Supreme Court's supervisory powers 8

4. The Tenth Circuit's analysis of Petitioners' First Amendment claims do not conflict with the decisions of other Appellate courts on these particular facts 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987).....6, 7

Andrews v. City of Philadelphia, 895 F.2d 1469 (3rd Cir. 1990).....7

Bailey v. Kirk, 777 F.2d 567 (10th Cir. 1985).....9

Bohen v. City of East Chicago, 799 F.2d 1180 (7th Cir. 1986).....6

Burner v. United States, 343 U.S. 112 (1952).....8

Connick v. Myers, 461 U.S. 138 (1983).....10

Derr v. Gulf Oil Corp., 796 F.2d 340 (10th Cir. 1986).....9

Dixon v. Richer, 922 F.2d 1456 (10th Cir. 1991).....3

Florida v. Rodriguez, 469 U.S. 1 (1984).....4

Hanna v. Plumer, 380 U.S. 460 (1965).....8

Harlow v. Fitzgerald, 457 U.S. 800 (1982).....3, 4

Insurance Corp. v. Compagnie Des Bauxiets, 456 U.S. 694 (1982).....6

Medina v. City and County of Denver, 960 F.2d 1493 (10th Cir. 1992).....6

Pickering v. Board of Education, 391 U.S. 563 (1968).....9

Powell v. Mikulecky, 891 F.2d 1454 (10th Cir. 1989).....3

Ross v. Moffitt, 417 U.S. 600 (1974).....4

TABLE OF AUTHORITIES – Continued

Page

Starrett v. Wadley, 876 F.2d 808 (10th Cir. 1989) 7

United States v. Lorenzetti, 467 U.S. 167 (1984)..... 5

OTHER

42 U.S.C. § 1983.....1, 2

Martin A. Schwartz and John E. Kirklin, Section 1983 Litigation: Claims, Defenses, and Fees, Sect. 9.20, at 537 (2nd ed. 1991) 7

STATEMENT OF THE CASE

Course of Proceedings

Respondents' Motion for Summary Judgment based upon the affirmative defense of qualified immunity in a civil rights suit under 42 U.S.C. § 1983 was denied in United States District Court for the District of Wyoming. (Petitioners' Appendix A).

The denial of qualified immunity was appealed to the United States Court of Appeals for the Tenth Circuit. In that decision the Tenth Circuit reversed a majority of the lower court's decision. (Petitioners's Appendix B). A petition for rehearing was denied.

Petitioners then petitioned for a Writ of Certiorari in the United States Supreme Court. Respondents were requested to file a Brief in Opposition.

Relevant Facts

Respondents incorporate by reference the statement of the facts in the Tenth Circuit opinion below. (Petitioners' Appendix B p. 66a-76a).

Respondents would ask the Court to note pursuant to Supreme Court Rule 15 that Petitioners have misstated or at least implied that certain facts were different from what they actually are. In Questions Presented by Petitioners, Question One refers to " * * * sexual harassment against female *co-workers* * * * " (emphasis added). Furthermore, in Petitioners' Question Four, Petitioners refer to " * * * sexual harassment in the *work place* * * * " (emphasis added). It cannot be emphasized enough that the Respondents who were granted qualified immunity

by the Tenth Circuit Court of Appeals were neither co-workers nor co-employees. Although the acts complained of happened at Petitioners' work place, no act involved a co-worker or a co-employee. Only persons who did not have supervisory authority or any responsibility for Petitioners' working conditions were alleged to have violated Petitioners' constitutional rights.

SUMMARY OF ARGUMENT

Although Petitioners have set forth four separate arguments, the major underlying theme is whether or not the decision below is in conflict with the Supreme Court or the decisions of other Courts of Appeal. The United States Supreme Court has announced the proper constitutional analysis in cases regarding employment and 42 U.S.C. § 1983. The Tenth Circuit properly applied the appropriate analysis in each situation. There are no questions presented which raise a legal controversy of importance or show direct conflict. Petitioners are asking the Court to review the Tenth Circuit's decision in the same manner, but reach a different result. For this reason, the writ of certiorari should be denied.

ARGUMENT

NO GROUNDS EXIST FOR GRANTING CERTIORARI

1. The Tenth Circuit Court of Appeals properly applied the United States Supreme Court's analysis in determining that qualified immunity protected Respondents.

The Tenth Circuit properly limited its review to the question of whether or not the district court had correctly denied Respondents' Motion for summary judgment based upon qualified immunity. The court cited *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), for the proposition that under the doctrine of qualified immunity governmental officials "generally are sheltered from liability for civil damages insofar as their conduct does not violate clearly established federal statutory or constitutional rights of which a reasonable person would have known."

The Tenth Circuit Court then set forth the procedure to be used in analyzing a claim of qualified immunity. First, the defendant must raise the defense of qualified immunity. Once that defense has been adequately raised, the plaintiff has the burden to show that the law was clearly established at the time that the alleged violation occurred, and present a factual basis sufficient to show that the officials violated clearly established law. The defendant then must meet the summary judgment burden of establishing that no material facts that would defeat a claim for qualified immunity remain in genuine dispute. The Tenth Circuit cited *Dixon v. Richer*, 922 F.2d 1456 (10th Cir. 1991), and *Powell v. Mikulecky*, 891 F.2d 1454, 1457 (10th Cir. 1989).

Although Petitioners state in argument that the Tenth Circuit's application of qualified immunity " * * * is in conflict with this Court's prior rulings and raises important questions of federal law * * * ", Petitioners cite no case which requires a different constitutional analysis regarding qualified immunity. In fact, Petitioners acknowledge that they are asking the Court to review "under the facts set forth above" whether Respondents are entitled to qualified immunity. Petitioners are merely asking that this Court apply the same analysis set forth in *Harlow v. Fitzgerald,* but arrive at a different conclusion.

A mere factual disagreement does not create a conflict requiring this Court to grant a Writ of Certiorari. The Tenth Circuit did not reach a decision which indicates a misapprehension of the controlling law regarding qualified immunity. *See, Florida v. Rodriguez,* 469 U.S. 1 (1984). Petitioners have not shown a conflict with the Supreme Court or with any other Circuit requiring the Supreme Court to provide guidance.

In *Ross v. Moffitt,* 417 U.S. 600 (1974), the Supreme Court granted certiorari to determine a conflict among several Circuits regarding the extent of right to counsel. The decision would have an effect on numerous cases because it defined the scope of a major constitutional right. In the present case, there is no conflict regarding the applicable law. The only possible result of a reversal by this Court would be a different factual outcome under the same legal analysis. A different decision would affect no other case. Certainly a mere factual disagreement does

not create an intolerable conflict, requiring intervention by the Supreme Court. *See, United States v. Lorenzetti*, 467 U.S. 167 (1984).

2. The Tenth Circuit Court of Appeals' determination that sexual harassment as a violation of the Equal Protection Clause was not clearly established as applied to these facts did not conflict with decisions of other Appellate Courts.

Petitioners argue that the Tenth Circuit's determination that the law was not clearly established in the Tenth Circuit until May of 1989 that sexual harassment violates the Equal Protection Clause is in conflict with other circuit courts. Once again, Petitioners are asking this Court to grant certiorari based on a disagreement with a factual determination. It should be noted by the Court that Petitioners make no distinction among the various Petitioners and the acts of the various Respondents or the times in which events occurred, but merely argue that in general, sexual harassment must violate equal protection.

The Tenth Circuit determined a difference between the "supervisors" and the other officers, though none were co-workers or co-employees. The Tenth Circuit also distinguished between Petitioner Butler, who quit employment in May 1987, and Petitioners Molina and DeSomber who asserted Equal Protection claims against the supervisors until approximately May, 1989. The court also found that Petitioners Molina and DeSomber "failed to provide any specific evidence of conduct by the supervisors amounting to an actionable conscious failure to

curb the officers' sexual harassment after May 1989." (Petitioners' Appendix B p. 85a).

The Tenth Circuit, in a very thoughtful and well reasoned decision, analyzed the proper procedure for determining clearly established law. Again, Petitioners are asking the Supreme Court to grant certiorari merely to obtain a different factual decision, not to clarify a conflict among jurisdictions. *See Insurance Corp. v. Compagnie Des Bauxiets,* 456 U.S. 694 (1982). A decision favorable to Petitioners would not affect any other cases, it would only apply to the factual situation to the case at bar.

Furthermore, the Tenth Circuit properly analyzed the determination of clearly established law. The Tenth Circuit cited *Anderson v. Creighton,* 483 U.S. 635 (1987), for the proposition that the Supreme Court has admonished against looking at a general right, such as the right to be free of sexual discrimination for purposes of the "clearly established" test. The Tenth Circuit looked at the law of other jurisdictions and closely analyzed those cases in conjunction with its own decisions. The court noted that it was aware of only one case, prior to May 1989, that determined sexual harassment was actionable under the Equal Protection Clause. That case was *Bohen v. City of East Chicago,* 799 F.2d 1180 (7th Cir. 1986).

The Tenth Circuit acknowledged that in order for the law to be clearly established, there must be either a United States Supreme Court or Tenth Circuit decision on point, or that the clearly established weight of authority from other circuit courts must have found the law to be what the plaintiff maintains it to be. *See Medina v. City and*

County of Denver, 960 F.2d 1493 (10th Cir. 1992). The Tenth Circuit's position is in accord with other authorities. *See* Martin A. Schwartz and John E. Kirklin, *Section 1983 Litigation: Claims, Defenses, and Fees*, 9.20, at 537 (2nd ed. 1991). That section was quoted by the Tenth Circuit as stating that "[n]ormally, a single recent case from one circuit is not sufficient to make the law clearly established in another circuit. Also, a district court decision will not ordinarily ' "clearly establish" the law even of its own circuit, much less that of other circuits.' " (footnotes and citations omitted).

The Tenth Circuit Court also stated that to the extent that *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3rd Cir. 1990), held that sexual harassment by a state employer was actionable under the Equal Protection Clause, the circuit court would disagree with the analysis based on the admonishment of the Supreme Court in *Anderson v. Creighton, supra*. This disagreement does not create a conflict, however, because regardless of the time period, both circuits are now in agreement regarding the law. *Starrett v. Wadley*, 876 F.2d 808 (10th Cir. 1989).

Although Petitioners cite general law and cases regarding sexual discrimination, they cite no cases which show clearly established law on the facts of this case. Furthermore, it should be noted again by this Court that these officers are neither "co-workers" nor "co-employees." Petitioners have cited no cases where one would violate equal protection through sexual harassment in a non-employment setting.

3. The factual determination regarding constructive discharge does not require the Supreme Court's supervisory powers.

Petitioners argue that the Tenth Circuit's factual determination regarding constructive discharge "departs so far from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision." (Petitioners' Brief p. 37).

Once again, Petitioners are doing nothing more than asking the Court to apply the clearly established constitutional analysis used by the circuit court, but come to a different factual decision.

The Court has exercised its supervisory powers in questions where the lower court's decision threatened the goal of uniformity of federal procedures. *Hanna v. Plumer,* 380 U.S. 460 (1965). The Court has also granted certiorari when questions involved the very jurisdiction of the federal court system. *Bruner v. United States,* 343 U.S. 112 (1952). The Court seldom grants certiorari merely because Petitioners desire a different factual outcome.

Furthermore, the Tenth Circuit was correct in its analysis regarding constructive discharge. The court stated that it has been clearly established since at least 1985 that constructive discharge from employment as to which an employee has a protectionable property or liberty interest may be actionable under 1983. It also stated that it has been clearly established that constructive discharge has existed since at least 1986. The court said that when a reasonable person would view the working conditions as intolerable and when the working conditions are so difficult that a reasonable person in the employee's

position would feel compelled to resign, this constitutes constructive discharge. *Derr v. Gulf Oil Corp.*, 796 F.2d 340 (10th Cir. 1986), and also citing *Bailey v. Kirk*, 777 F.2d 567 (10th Cir. 1985). The court, however, stated that Petitioner Butler had not established a genuine dispute of material facts regarding her working conditions. The court stated that Butler did not establish that she took steps short of resignation, that a reasonable person would have taken. Although she testified to facts suggesting intolerable treatment, she did not formally complain about this treatment until after she had quit. The Court stated that Butler had an alternative to resignation and she knew about that alternative. She could have lodged a formal complaint, and she ultimately did file a formal complaint, but not until after her resignation.

Certainly Petitioner does not dispute any of these facts, but merely would like the United States Supreme Court to come to a different conclusion using the same analysis. Such a situation does not call for the extraordinary remedy of the Court's supervisory powers.

4. The Tenth Circuit's analysis of Petitioners' First Amendment claims do not conflict with the decisions of other Appellate Courts on these particular facts.

The Tenth Circuit, in analyzing Petitioners' First Amendment claim states that a public employer may not condition employment or its incidence upon a relinquishment of the employee's First Amendment rights. *Pickering v. Board of Education*, 391 U.S. 563 (1968). Note that none of Respondents were the employer of Petitioners. The

court also acknowledged that the Supreme Court provided guidance regarding what is or is not public concern in *Connick v. Myers*, 461 U.S. 138 (1983). The Tenth Circuit properly determined that in analyzing a First Amendment retaliation for speech claim against a public employer the court must determine whether the employee's speech was on a matter of public concern. The Court must then balance the interest of the employee as a citizen in commenting upon these matters, and also the interest of the State as an employer in promoting the efficiency of the public services it performs.

Again, Petitioners do not argue that the analysis used by the Tenth Circuit is in conflict with other Courts of Appeal. Petitioners, once again, merely dislike the factual determination resulting from this analysis.

The Tenth Circuit was correct both in its statement of controlling law and its application. The Court stated that it was aware of no cases holding that "speech similar to that made by plaintiffs" pertain to a matter of public concern. (Petitioners Appendix p. 111a). Petitioners have cited no cases resulting in a different holding which are similar to speech in this case. Again all Petitioners are asking for is a different factual outcome, not a different application of law.

The Tenth Circuit noted that Petitioners' First Amendment claim against Williams, Sackett and Mitchell suffered from an additional defect in that they were not plaintiff's supervisors. The court stated "[w]e are aware of no case law clearly establishing that a non-supervisor can be liable under 1983 for responding critically to speech made by a co-employee, much less a person who,

as in this case, is not even a co-employee." (Petitioners' Appendix p. 112a). Petitioners have cited to no cases establishing liability under these circumstances.

Petitioners have not set forth grounds adequate for a Writ of Certiorari.

CONCLUSION

Petitioners have failed to show that the Tenth Circuit Court of Appeals erred in its constitutional analysis regarding qualified immunity as it pertains to Equal Protection, constructive discharge, or First Amendment claims.

Obviously, and understandably, Petitioners disagree with the application of the appropriate constitutional analysis to the facts as they exist in this case. Disagreement with the facts, however, does not create constitutional issues worthy of review by the Supreme Court, particularly, when as here, the Tenth Circuit Court of Appeals properly applied the appropriate constitutional analysis.

Respondents ask that the Writ of Certiorari be denied.

Respectfully submitted this 4th day of June, 1993.

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